No. 89-112 (2)

In The

# Supreme Court of the United States

October Term, 1989

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MARC L. GOLDSTEIN,
*Petitioner,*

vs.

THE STATE BAR OF CALIFORNIA,
*Respondent.*

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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## QUESTION PRESENTED

Whether a Federal Constitutional issue is raised by the action of the Supreme Court of California in cancelling petitioner's license to practice law in California because of his fraudulent behavior in gaining admission to the California bar when petitioner was: (1) provided due process in that he had an adversarial hearing before the State Bar Court where he cross-examined the witnesses testifying against him and presented testimony on his own behalf, and his misconduct was proved; (2) provided a second hearing before the Review Department of the State Bar Court at which he presented written and oral argument after which the Review Department made unanimous findings of misconduct and a unanimous recommendation to cancel petitioner's license which finding and recommendation were forwarded to the California Supreme Court; (3) provided

independent review by the California Supreme Court which ordered petitioner's license to practice law cancelled, only after written briefing and oral argument, in a decision filed on January 26, 1989; and, (4) represented throughout every step by counsel in proceedings that were fair and provided petitioner complete due process.

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Respondent the State Bar of California respectfully prays the Court to deny a writ of certiorari to review the judgement and decision of the California Supreme Court cancelling petitioner's right to practice law in California, filed January 26, 1989. That decision is reported as Goldstein v. State

Bar, 47 Cal.3d 937 (1989). (A copy of the opinion is included in petitioner's appendix to the petition for writ of certiorari [hereinafter "P. A."], P. A. at 1-21.)

## JURISDICTION

Petitioner claims jurisdiction pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution. We submit, however, that a due process claim cannot be established under the specific facts of this case where petitioner was given a panoply of pre-deprivation hearings before his license to practice law was cancelled.

## STATEMENT OF THE CASE

The State Bar of California incorporates by reference the "Facts" as enunciated in the opinion below and set forth as follows:

### FACTS

> In February 1979, petitioner took and passed the California bar examination. His certificate for admission, however, was delayed

pending a moral character investigation. In July 1982, following a lengthy hearing, a hearing panel of the State Bar Court recommended that petitioner's certificate for admission be denied on the ground that he did not possess the requisite moral character. This recommendation was based on findings that petitioner: (1) deliberately abused the judicial process by filing numerous actions to harass tradespeople and others with whom he had petty disputes and to obtain nuisance settlements to which he was not entitled; (2) knowingly made false statements under oath to advance his interests in the course of several of his lawsuits; (3) engaged on several occasions in the unauthorized practice of law; and (4) committed acts of fraud against various entities, including the filing of a false claim for reimbursement for "lost" money orders which were not in fact lost, making knowingly false statements on an application to practice law in Georgia, filing claims for lost baggage against several airlines which either falsely stated that the baggage was lost or greatly exaggerated the value of the items lost, making false statements on a credit application, and engaging in a check-kiting scheme.

On January 19, 1983, following a further hearing at which petitioner testified, the Committee of Bar Examiners adopted the findings of the hearing panel and denied

petitioner certification to practice law in the state of California. The committee further ruled that "[p]ursuant to Rule X, Section 104 (a) [of the Rules of the State Bar Regulating Admission to Practice Law in California] the period when another application may be filed is extended to three years from the date of denial of the application."[1] Petitioner unsuccessfully sought review of the ruling from this court, and, through counsel, made unsuccessful written attempts to obtain a waiver of the requirement that he retake the California bar examination.

By a letter dated January 8, 1985, only two years after the ruling of the Committee of Bar Examiners, petitioner made a written request for an application form to take the February 1985 bar examination. The letter followed a telephone conversation between petitioner and Paula Daniels, employed by the State Bar as an assistant section chief of receipts, the content of which is in dispute. At his request, petitioner

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[1] Although the committee did not make its formal written findings and conclusion until January 19, 1983, it heard the matter on November 19, 1982, and mailed petitioner notice of its intended decision four days later. It is unclear whether the three-year period established by the committee began in November 1982 or January 1983; however, the question does not affect the result in the instant proceeding.

was provided the "attorney-repeater" application packet, and applied for and took the February 1985 bar examination.[2] He failed that examination, and subsequently applied for and took the July 1985 examination. Neither his letter nor his application forms mentioned the hearings into his character or that he had previously been denied certification to practice law. The application forms did mention that he had previously applied to practice law in 1979, and furnished an update of the three cases to which petitioner was a party which had not been resolved at the time of his previous application.

Shortly after petitioner took the July 1985 bar examination, the State Bar requested from him further information regarding the three cases listed on his application, which he provided. In the course of providing this information, he had several telephone conversations with Admissions Analyst Bernado Rodriguez. The State Bar also requested a copy of his 1979 application to take the bar examination. Petitioner provided a copy of this application; however, the answers to two of the questions on the 1979 form (the questions dealing with accusations of fraud

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[2] Petitioner was an attorney licensed to practice law in Kansas, and was a "repeater" because he had previously taken the bar examination.

and civil litigation in which he had been involved) read, "see attached sheet [information is being compiled and will be mailed in shortly]." (Brackets in original.) The copy of the 1979 application provided by petitioner contained no "attached sheets", and the cover letter he attached made no mention of the inquiry into his character.

Petitioner passed the July 1985 bar examination. The State Bar failed to recognize that there had been previous hearings into his moral character, and routinely recommended that he be certified for admission. Following our order admitting him to practice on December 10, 1985, the State Bar discovered its oversight, and the instant proceedings commenced.

Petitioner contends the recommendation of the review department is unsupported by the evidence, that prejudicial evidence was improperly admitted against him at the hearing, and that the State Bar denied him discovery of relevant and exculpatory evidence. As will be seen, we find each of these claims unmeritorious. P.A. at 2-5.

## REASONS WHY THE PETITION SHOULD BE DENIED

### A. The California Supreme Court Fully Considered and Correctly Decided the Issues.

As best stated by the Supreme Court of California:

> [T]he effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character. . . . Under these circumstances, the most appropriate resolution of the matter is to withdraw from petitioner the benefits he wrongfully obtained.
>
> We were confronted with a similar situation in State Bar v. Langert (1954) 43 Cal.2d 636 [276 P.2d 596]. In Langert, we found that an attorney had gained admission to the bar as a result of having made materially false statements on his application. Rather than disbarring him, we ordered his license cancelled and his name stricken from the roll of attorneys. The same remedy is appropriate here. P. A. 20 at 21.

Petitioner alleges the California Supreme Court was in no position to exercise its independent judgment concerning discipline since no record concerning

discipline had been made in the State Bar Court. Petition, p.12 n.9.

To the contrary, we submit that a strong record was presented to the California Supreme Court concerning petitioner's fraudulent conduct in gaining admission to the California bar. Because of that fraud the supreme court, when it cancelled petitioner's license to practice law, simply took from petitioner that which he had wrongfully obtained. Petitioner's misconduct was proved with evidence in full adversarial hearings before a Hearing Panel of the State Bar Court (single-member) whose findings (P. A. at 27-40) were adopted by eleven (11) referees of the Review Department of the State Bar Court (P. A. at 22-26),[3] after

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[3] Petitioner's appendix does not include a September 6, 1988, Review Department order which corrected several typographical errors, "nunc pro tunc", in its original order as follows: " 1) as to modification 5 [of the original order, P. A. (continued...)

briefing and oral argument. Finally, after further briefing and oral argument, the California Supreme Court adopted the recommendation of the State Bar Court. P.A. at 2.

At all times herein mentioned, petitioner was represented by counsel who engaged in extensive discovery and motion practice before the State Bar Court.

Moreover, proceedings before the State Bar of California ("State Bar") are adversary proceedings in which the State Bar has the burden of establishing misconduct by convincing proof and to a reasonable certainty. Franklin v. State Bar of California, 35 Cal.3d 274, 291 (1986). The

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[3](...continued)
at 23] inserts the number "8" after the phrase, "page 12, line"; and" [¶]" 2) as to modification 6), corrects the opening three lines of the description of the modification to read: "hearing panel decision, page 12, line 10 through line 23, should be deleted and the following substituted:""

California Supreme Court must decide independently whether the State Bar's findings are supported by the evidence and it will not consider the allegations proven unless sustained by clear and convincing evidence. Arden v. State Bar of California, 43 Cal.3d 713, 725 (1987).

Next, petitioner alleges the parties agreed to afford him a disciplinary hearing in the event of a finding of misconduct, and that "[t]he question of the appropriate discipline to be imposed was deliberately not discussed in the proceedings before the Hearing Panel or the Review Department of the State Bar Court". Petition, p.11.

Demonstrably, this contention is incorrect. There was discussion concerning petitioner's stipulation to discipline before the State Bar Court. Said stipulation however was never presented to the Office of Chief Trial Counsel nor to the State Bar

Court pursuant to rules 401-407 of the Rules of Procedure of the State Bar, because petitioner himself rejected it.[4] Compare Petition, p. 7-8, and p.11. It is clear that petitioner had notice that potential

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[4] Particularly, rule 407 deals with termination of formal proceedings by way of "STIPULATION AS TO FACTS AND DISPOSITION". The rule provides: "(a) If the stipulation as to facts and disposition is entered into at the investigation stage, the review department shall review the stipulation as provided for in rule 450(b)." [¶] "(b) If the stipulation as to facts and disposition is entered into at the formal hearing stage, the hearing panel or settlement conference referee shall examine into the facts or indicated facts, the fairness of the stipulation as to facts and as to disposition, and the effect of the stipulation upon the matters which are or may be client security fund matters or serious offenses. The hearing panel or settlement conference referee may order the approval of the proposed stipulation or its approval with modifications to the stipulation accepted by the parties. Thereafter, the review department shall review the order approving the stipulation as provided in rule 450(b)." Rule 450 (b) provides plenary authority to the review department to adopt, modify or decide the case on the record even when no satisfactory requests for review are filed regarding a hearing panel recommendation.

discipline was a matter at issue in his proceedings.

Further, all matters pertinent to any discipline issue were fully before the Supreme Court of California when it decided petitioner's case. Hence petitioner has no cause for complaint.

More importantly, however, the Supreme Court of California did not impose discipline in this matter. It cancelled petitioner's license to practice law because petitioner had obtained that license through fraud. See note 5 infra. Nevertheless, petitioner was given all the due process to which he was entitled under law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Barry v. Barchi, 443 U.S. 52 (1979); Mathews v. Eldridge, 424 U.S 319, 348-49 (1976).

B. The Cases Relied On By Petitioner Do Not Support His Cause.

None of the federal cases petitioner cites even remotely suggest that an attorney

has been denied due process of law when given a full adversarial hearing in which to challenge any possible deprivation concerning his license. The California proceedings were fair and gave petitioner procedural due process, including notice and an opportunity to be heard. He cannot now be heard to complain. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); In Re Ruffalo, 390 U.S. 544 (1967); Selling v. Radford, 243 U.S. 46, 51-52 (1917).

Additionally, the state court decisions petitioner cites do little to advance his cause. Petitioner was given a hearing and the identical procedural safeguards appropriate to his matter that apply to all State Bar disciplinary hearings on the merits.[5] To the extent that matters possibly

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[5] This is so even though petitioner's was not strictly a disciplinary hearing, but a hybrid moral character matter to determine whether petitioner had gained admission to (continued...)

mitigating petitioner's misconduct were not introduced or argued, petitioner himself is to blame. Petitioner, as does the State Bar, must live with the record created below. Thus the decisions cited by petitioner in support of his due process claim are entirely inapposite. See Petition, p. 15-16.

Lastly, State Bar of California attorney misconduct proceedings have consistently

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[5](...continued)
the California bar through fraud. And, if so, whether he should be disciplined or have his license to practice cancelled because it was obtained fraudulently. At oral argument before the California Supreme Court, State Bar counsel sought disbarment as discipline for petitioner's misconduct. The court expressly rejected this argument as follows: "We do not agree. The effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character. There is no evidence that petitioner has committed any acts of misconduct since becoming a member of the bar. Under these circumstances, the most appropriate resolution of the matter is to withdraw from petitioner the benefits he wrongfully obtained." P. A. at 20. Hence petitioner has never been truly "disciplined" for any misconduct, but only made to forfeit what he fraudulently obtained.

survived constitutional due process scrutiny by the California Supreme Court. See, e.g., Van Sloten v. State Bar, 48 Cal.3d 921, 928 (1989); In Re Utz, 48 Cal.3d 468, 477-78 (1989); Rosenthal v. State Bar, 43 Cal.3d 612, 634 (1987); Martin v. State Bar, 20 Cal.3d 717, 722-23 (1978).

In Van Sloten, supra, the court held:

> We have long recognized the regulatory ability of the State Bar, and have found that the procedural safeguards provided by the Rules of Procedure of the State Bar are adequate to insure that administrative due process will be observed. 48 Cal.3d at 928.

In Martin, supra, the court held:

> Petitioner has a "duty to present to the [hearing and review panels] any evidence which he deemed favorable to himself. He may not neglect to do this and rightly demand in his petition for review either that such evidence should be considered by this court or that he is entitled to another hearing before the State Bar." 20 Cal.3d at 722-23, citing Coviello v. State Bar 45 Cal.2d 57, 65 (1955).

Likewise here, petitioner cannot claim any constitutional due process violation for something he simply failed to do.

## CONCLUSION

Petitioner was accorded a full evidentiary hearing concerning allegations of his misconduct in fraudulently gaining admission as an attorney to the California bar. After intense litigation over a three (3) year period, the evidence against petitioner was found to be compelling. Therefore the California Supreme Court ordered that petitioner forfeit that which he had wrongfully obtained through fraud and deceit. Petitioner's due process challenge to that order fails under prevailing constitutional standards because petitioner had ample notice, and a fair hearing in adversary proceedings challenging his certification to practice law in California as fraudulently obtained. State Bar of

California attorney misconduct proceedings have consistently survived constitutional due process scrutiny by the California Supreme Court where petitioner's and like matters are subject to independent review before any legal rights are effected.

For all the foregoing reasons the petition for writ of certiorari should be denied.

DATED: August 21, 1989.

Respectfully submitted,

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